(29)

No. 210

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

RAPID ROLLER CO., A CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER

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The brief of the Board in opposition serves merely to accentuate the serious errors in law of the court below.

I.

SECTION 2(3) OF THE NATIONAL LABOR RELATIONS ACT DOES NOT EXTEND THE EMPLOYEE STATUS BEYOND THE AGREED DATE OF TERMINATION OF THE EMPLOYMENT AGREEMENT

Important in the interpretation of the National Labor Relations Act and never decided by this Court is the ques-

tion whether § 2(3) of that Act has the affirmative effect of extending the employee status despite the happening of an event, other than a strike, which the employer and employee have agreed shall terminate that status. The Board apparently asserts that § 2(3) operates to continue the employee status beyond the date of termination of the contract of employment (Br. in Opp. 19-20).[1] The argument of the Board and the inapplicability of the cases cited by it conclusively demonstrate that there is here presented a question of great importance in the administration of the Act which has not yet been but should be decided by this Court. The only cases cited by the Board in support of its proposition are: *National Labor Board* v. *Mackay Co.*, 304 U. S. 333, 347; *National Labor Board* v. *Waterman S. S. Co.*, 309 U. S. 206, 219.[2] Those cases afford no support for the Board's contention that, despite the ending of the definite term of the employment contract, the employee relationship continued by virtue of § 2(3) of the Act. Indeed, they impliedly recognize that the Board's position is without merit.

The decision in the *Waterman S. S. Co.* case was ruled by the principle that the Act protects those who have a con-

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[1] In form the argument of the Board does not even meet the question involved. In essence it is (Br. in Opp. 19):

> The employee status preserved under Section 2(3) * * * is in no sense dependent upon whether the interrupted employment relationship is for a term or at will.

Petitioner has never argued to the contrary. The question is whether the employee status preserved under § 2(3) against termination by strike is by that section *extended beyond* the date fixed by the parties where "the interrupted employment relationship is for a term".

[2] It is unnecessary to consider the citation of *National Labor Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 344, and *National Labor Board* v. *Fansteel Corp.*, 306 U. S. 240, 254. It cannot seriously be argued that in those decisions there was any intimation that the causes of termination of the employee relationship there recognized were by this Court held to be exclusive.

tinuing tenure of employment, and that that employment depends on contract, express or implied. Contentions of the employer that "all tenure of employment and employment relationship of these men were at an end" (p. 211) was there rejected on evidence showing (1) that signing off or termination of statutory ship's articles did not terminate employment (pp. 213-217) and (2) a provision of the written union contract contemplated a continuing contract independent of such articles. No question of the effect of § 2(3) was there involved. Certainly, nothing in that case can be regarded as supporting the view that continuation of the employee status under § 2(3) of the Act is independent of the clear and specific agreement of the parties that employment shall be only for a fixed term ending on a definite date.

In *National Labor Board* v. *Mackay Co.*, 304 U. S. 333, this Court held that § 2(3) operates with § 8(3) to protect strikers against discriminatory refusal of reinstatement because of their union activities (pp. 346-347). But in that case the contention that the term of employment had ended was founded solely upon the fact of strike. The ruling, confined to denial of this narrow contention alone, and which the Board cites to support its argument, was (p. 347):

> The plain meaning of the Act is that if men strike in connection with a current labor dispute their action is not to be construed as a renunciation of the employment relation and they remain employees for the remedial purposes specified in the Act.

Section 2(3) was there effective to preserve the employee status of the strikers against termination as a result of the strike.

But the language of the section does not purport, and this Court has never held that it is to be construed, to prevent the employment relation from ending at the time that the parties have agreed that it shall end. Indeed, this Court has expressly said in *National Labor Board* v. *Waterman S. S. Co.*, 309 U. S. 206, 218-219:

> The Act, as has been said, recognizes the employer's right to terminate employment for normal reasons. *National Labor Relations Board* v. *Jones & Laughlin Corp.*, 301 U. S. 1, 45.

Expiration of the agreed term of employment is clearly a normal reason for termination of the employment status (Pet., p. 17).

The Union itself in this case recognized that the employee status ended with the expiration of the contract entered into in April, 1938 (1 R. 91-94). For at the time that it tendered a new contract (4 R. 1919-1929; 2 R. 706; 3 R. 1390) it asked a companion agreement that the petitioner "reemploy" the strikers (4 R. 1930).

It must be concluded that, as petitioner contends, on the date as of which the Board has ordered reinstatement, there was no contract of employment by which to determine the terms and conditions properly measuring the rights of the parties under the enforced new relationship. The employees had declared that they were unwilling to work for the old wages. After April 23, 1939, they were demanding higher wages and shorter hours. Since the old contract had expired, it would be equally as permissible to measure the wages under reinstatement by reference to the demanded contract as by reference to the extinct one. As a matter of law, neither could be used without in effect writing a contract for the parties.

II.

THE CIRCUIT COURT OF APPEALS ERRED AS A MATTER OF LAW IN HOLDING THAT THERE WAS SUBSTANTIAL EVIDENCE TO SUSTAIN THE BOARD'S FINDING THAT PETITIONER REFUSED TO BARGAIN COLLECTIVELY

Not only is it clear that the court below approached the case upon an erroneous rule of review, but a consideration of the undisputed facts demonstrates that both the Board and the court below have relied upon inferences which are plainly contradicted by admitted facts.

A. The rule of decision announced by the court below is in conflict with the decisions of this Court and of other circuit courts of appeals.

The brief of the Board (p. 17) merely emphasizes and seeks to perpetuate the erroneous rule adopted by the court below (4 R. 2036):

> The main question in this case, around which all others revolve, is whether or not there is substantial evidence to support the Board's order. It is axiomatic that upon such a question we do not retry the case or weigh the evidence or pass upon the credibility of the witnesses. In discharging our duty in these circumstances, *we look only to the evidence that is favorable to the Board.* (Emphasis added.)

The Court by confining consideration exclusively to "the evidence that is favorable to the Board" thus closed its eyes to all but that part of the record upon which the Board relied and excluded from consideration numerous uncontradicted facts which, by their overwhelming and conclusive

nature, can leave no doubt in a reasonable mind that, contrary to the Board's finding, the petitioner did collectively bargain as required by § 8(5) of the Act.

Of course, this Court has never lent countenance to any such capricious doctrine as that laid down by the court and here sought to be sustained by the Board either in the cases cited by the Board (Br. in Opp., pp. 17-18) or in any other case. On the contrary, in *National Labor Board* v. *Columbian Co.*, 306 U. S. 292, 299-300, this Court has held that the substantive evidence required to support the finding of the Board upon review under § 10(c) of the Act

> must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.

And in citing in the same case *Gunning* v. *Cooley*, 281 U. S. 90, 94, this Court in effect ruled that as an integral part of the same rule there is also applicable in review of the Board's findings the principle stated in that case (p. 94):

> Where the evidence upon any issue is all on one side or so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury. *People's Savings Bank* v. *Bates*, 120 U. S. 556, 562; *Southern Pacific Company* v. *Pool*, 160 U. S. 438, 440.

Obviously the application of the rule of substantial evidence requires an examination by the court, not confined "only to the evidence that is favorable to the Board" but "upon the whole case". *Southern Ry. Co.* v. *Walters*, 284 U. S. 190, 192; *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333, 340-341. In *National Labor Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 342, this Court applied the rule that inferences based on testimony favorable to the Board lose weight and are reduced to less than a scintilla when considered in

the light of uncontradicted evidentiary facts favorable to the employer.

Conflict with other circuit courts of appeals is apparent from the decisions fully recognizing that in review of findings of the Board undisputed evidence disproving the allegations of the actor or qualifying other evidence so as to make it innocuous may not be arbitrarily rejected and disregarded and that application of the rule requiring substantial evidence necessitates that the whole of the evidence be examined. *National Labor Relations Board* v. *Thompson Products, Inc.*, 97 F. 2d 13, 15 (C. C. A. 6); *National Labor R. Board* v. *Grower-Shipper V. Ass'n*, 122 F. 2d 368, 375-376 (C. C. A. 9); *National Labor Relations Board* v. *Tex-O-Kan F. Mill Co.*, 122 F. 2d 433, 438 et seq. (C. C. A. 5); *American Smelting & R. Co.* v. *National Labor R. Board*, 126 F. 2d 680, 687-688 (C. C. A. 8).

B. The court and board, because of their erroneous view of the law, have given effect to ill-founded inferences which are conclusively nullified by the overwhelming weight of undisputed facts.

As a result of the hiring of four men by the petitioner the shop committee asserted that the hiring was a violation of clauses 1 and 10 of the contract of employment (Br. in Opp., p. 12). As a result, the following conferences were held with representatives of the Company to discuss the matter:

1. A short conference of 10 minutes on March 2 with Schwartz, the factory manager, and Rapport, the President (1 R. 319-322, 467-469; 2 R. 652-654, 971-972; 3 R. 1199-1200).

2. An extended conference of 4 or 5 hours on March 6 (1 R. 248; 2 R. 974, 1044; 3 R. 1346-1362) attended by the five members of the shop committee and two representatives of the International Union (1 R. 529; 3 R. 1347)

and Rapport and two attorneys representing the petitioner (2 R. 973).

3. Two discussions with Rapport, the president of the Company, on March 10, the day of the strike, which terminated, not with a refusal by the Company to further discuss the matter but simply with a decision by the Union to strike upon rejection by him of the points of a compromise suggested by the shop committeemen (1 R. 330-332, 477-478; 2 R. 976, 1050-1052).

4. On March 13, a two-hour meeting in the office of a Department of Labor conciliator attended by the shop committeemen and company representatives (3 R. 1364-1368).

5. On March 16, 1939, another meeting in the conciliator's office (3 R. 1372-1375).

6. March 27, 1939, a meeting in the law office of the Company's attorney attended by the shop committee, a United States labor conciliator, and an assistant corporation counsel of the City of Chicago at which the Company was represented by Rapport and the Company's attorney (3 R. 1378-1379).

It, therefore, is clear that the Company was willing to, and did, discuss the matters of difference with the shop committee. But the Board holds (1 R. 256) that the Company

> did not enter into discussions with Local No. 120 concerning the interpretation of the 1938 contract with an "open fair mind". In sealing its mind in advance against the thought of entering into an agreement with Local No. 120 concerning the interpretation of the contract, the respondent did not fulfill its duty under the Act to bargain collectively * * *.

The series of factual bases stated and relied upon by the Board and the inferences by it drawn from them may be

stated seriatim and contrasted with the undisputed evidence destructive of the Board's case which, by reason of the lower court's misapprehension of the law, was disregarded by it:

1. The inferences of bad faith based on the ancient history of the employer-employee relationship are destroyed by the record facts which were not considered by the Board or court below.—Each of the inferences of the Board based upon the earlier labor relations of the Company are unsupportable.

a. In April, 1938, the directors and attorneys of the Company, together with Rapport, stated that clause 1 of the subsequently ratified contract was "a substitute clause for the closed shop" (1 R. 239). The Board's inference, apparently, is that a "substitute clause" is identical in effect with that for which it was substituted and, therefore, the substituted clause created a closed shop contract. But this inference, in itself of highly doubtful validity, must fail in the light of established facts. It is obvious from comparison of the Union's draft (4 R. 1814-1816) with the final form (1 R. 91) that this could not have been the intent of the parties. Not only is the phrase "shall join the Union" changed to "may join the Union" in the first clause, but the tenth clause of the draft providing expressly for a "closed union shop" was stricken entirely (1 R. 91-94; 4 R. 1814-1817).

b. The purpose of clause 10 was to give effect to seniority in making promotions (1 R. 239-240). The Board's implied inference is that this was a limitation on the management's right to hire new men (1 R. 253). The inference is plainly unjustified if words are to be given their plain and accepted meaning.

c. Rapport, in October, 1938, submitted to the shop committee a 10-point plan for future transfers to the blanket department. The shop committee accepted many of the points but submitted some counter-proposals. At a meeting held thereafter Rapport objected to the counter-proposal that the grievance committee should handle any dispute between the transferee and the foreman (4 R. 1808). There were no further negotiations and, according to the testimony of committeeman Moscato, quoted by the Board, the committee "didn't know whether it had been accepted or not" (1 R. 241-242). The innuendo is that the Company was remiss in failing to continue negotiations and that failure to agree at that time proves unwillingness of the employer to deal with the blanket department except on its own terms (1 R. 256). Indeed, in its brief in this Court the Board asserts (pp. 10-11):

> Petitioner failed to act upon the Union's suggested modifications of the plan and the entire project lapsed thereafter.

But the record without contradiction shows that Mr. Rapport, in the meeting to discuss the Union's counter-proposals, unequivocably rejected the counter-proposal which demanded that the grievance committee should have jurisdiction of any dispute as to whether the work of a transferee was satisfactory (2 R. 962-964). Under the law as declared by this Court an employer is not compelled to seek out his employees or request their participation in negotiations for purposes of collective bargaining; to warrant a finding of a refusal to bargain collectively it must appear that the employees proffered new offers of negotiations. *National Labor Board* v. *Columbian Co.*, 306 U. S. 292, 297-298. Moreover, as shown below, negotiations were reopened by Company representatives.

d. During January, 1939, the foremen initiated conferences with the shop committee in an attempt to make up a list of future transferees to the blanket department. The shop committee presented a list to which the foremen objected for lack of qualifications of several of those named. No agreement was reached "and no more conferences were held with a view to reaching an agreement" (1 R. 242). The inference of the Board is that it became the duty of the Company to suggest a counter-list and its failure so to do is evidence of unwillingness on the part of the Company to deal as to the blanket department except on its own terms (1 R. 256). This inference is based upon an incomplete statement of the facts. The following *uncontradicted* and additional facts destroy the inference:

The Union submitted a list of 12 men whom it wanted transferred (4 R. 1809). Many of the men on the list were palpably unfitted for work in the blanket department. The shop committee recognized this by withdrawing Collins and Anthony, two colored janitors (2 R. 656; 4 R. 1541; 3 R. 1117, 1079); the name of Wagner on the list was passed (3 R. 1109) because he was a former employee of the blanket department who had been discharged for repeated tardiness and trouble making (4 R. 1631-1634, 1616-1620) and had later been given a job in another department (3 R. 1469). It was found that Krueger did not want to be transferred (3 R. 1108, 1136, 1242). Revica and Perille, two men doing the low grade work of strippers of rollers and truck unloaders (1 R. 97; 3 R. 1240-1241), were considered "dumbbells" (3 R. 1107-1108, 1240-1241, 1121-1122). Guinta was unwilling to be transferred because he was making more in another department (3 R. 1242). The Company was willing to take two men on the list, Paull and Pieracci (3 R. 1105-1108, 1240-1241, 1086-1087), but the shop committee would not consent to their being transferred unless men of greater

seniority were first transferred (3 R. 1241, 1086, 1106-1107, 1118, 1121-1122). Frazatella, Lawrence and Dulski were not offered by the Union after Revica and Perille were rejected. It was the Union's obstinacy that prevented the transfer of Paull and Pieracci, two men on their own list. After that impasse the Union promised to submit another list at a meeting to be held in three or four days (3 R. 1122, 1123, 1557) but this list was never prepared. A shop committeeman informed foreman Peters that there would be no further meeting until Schwartz, the factory manager, returned because "the committee and the superintendents can't come to any agreement of which men should be transferred to the blanket department" (3 R. 1124).

e. The Board next cites the fact that Schwartz, the factory manager, from that time until he hired the four men did not consult with the shop committeemen to ask them for their own final proposals (1 R. 242-243). The apparent inference is that the Company either on principle or by implied agreement sustained a duty to take the first step forward and that it failed to do so. Assuming, without conceding, that there was such a burden, the uncontradicted evidence shows that after Schwartz returned from his vacation foreman Peters again asked shop-committeeman Meyers about the meeting they were to have after Schwartz returned and was rebuffed by Meyers who said (3 R. 1124):

> There isn't going to be any more meetings to be discussed because we can't get to—because we can't get to no agreements. Just forget about any more meetings.

Meyers, although subsequently called back for rebuttal failed to contradict this testimony in any respect (4 R. 1570). Plainly the Company did all that it could be held bound to do in seeking to obtain an amicable settlement of the question of transfers to the blanket department. To

say, as the Board does, that the Company's conduct at that time was evidence of its unwillingness to deal as to the blanket department except on its own terms is to subvert the principles of fair hearing which include not only the right to present evidence but the right to have it considered. *Chicago Junction Case,* 264 U. S. 258, 265; *Morgan* v. *United States,* 298 U. S. 468, 480-481; *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337, 356-357.

f. The Board held (1 R. 246):

> Rapport's continuing anti-union attitude, as evidenced by [his] remarks, must be considered in evaluating Local No. 120's contention that the respondent thereafter refused to bargain collectively with it concerning the hiring of the four men.

Thus the Board resorted to the universally condemned practice of piling inference upon inference to reach its ultimate finding of lack of good faith. The first is the inference that Rapport was anti-union—an inference in itself of questionable validity since his statements and conduct are equally susceptible of interpretation that he recognized that he would have to deal with the Union and was quite willing to do so but that, appreciating this fact, he endeavored so far as possible to preserve in the management certain rights which he deemed indispensable to the function of management. Furthermore, this initial inference of the Board was reached only by avowedly disregarding the following uncontroverted facts in favor of the employer which overwhelmingly negative the validity of the conjectural inferences of the Board:

(1) The Company recognized Local 120 as soon as it was formed. Immediately upon its formation the company entered into negotiations with it (2 R. 943-944) which led to a binding contract for the following year (1 R. 100, 301-302; 4 R. 1802-1805). At the expiration of that year

it made a new contract, which was in force at the time of the difference in March, 1939 (See Pet., pp. 8-9, and footnote 4).

(2) Every production worker was a member of the Union; the plant was one hundred per cent organized at all times after the establishment of the Union (2 R. 870-871; 944; 3 R. 1198-1199; 4 R. 1891).

(3) On every occasion on which the Union representatives desired a hearing the employer received its representatives and dealt with them as representing all its production employees.

(4) In the two years in which the Union had operated there was never any disagreement concerning wages, hours, or working conditions. Every complaint on these subjects was satisfactorily adjusted after due bargaining with the representatives of the labor organization (1 R. 233, 237, 273; 2 R. 957-958; 3 R. 1183, 1226-1227).

(5) The employer had a long and enviable record of good labor relations; it furnished its men an extremely fine plant to work in, with individual lockers, showers and unusual cleanliness in every part of the factory (4 R. 1644); no employee was ever discharged during the Union relationship; for a time long before the unionization there was scarcely any change in the production staff, and this was pronounced by a representative of the national organization a remarkably creditable record as to labor turnover (2 R. 915); the Company paid wages higher than were paid by its competitors (2 R. 866; 3 R. 1323, 1330).

(6) On the only disputes which arose after the organization of the Union and prior to March, 1939, the Company had yielded one hundred per cent to the Union demands (Pet., 22-23).

(7) The Union fully recognized the satisfactory attitude of the management by writing to the parent organization on March 2, 1939, "We have never had any trouble with the management in the two years we have been organized with the exception of a successful (quickie) several months ago" (4 R. 1891); this exception was a reference to the Levy incident, one of those on which the employer completely yielded to the Union. The Union in another and subsequent communication spoke of its past relations with the employer as "amicable" (4 R. 1933).

(8) Shortly after the Union expressed a desire to have men from other departments transferred to the blanket department, the Company voluntarily entered upon months of conferences by way of endeavor to work out an agreement with the shop committee on a system of transfers from one department to another (2 R. 894; 3 R. 1085-1087, 1102, 1105-1106, 1117-1122, 1124, 1213-1214, 1240; 4 R. 1806-1807).

Upon its threadbare inference of anti-union attitude on the part of Rapport, the Board, however, confessedly piles the further inference, even more unfounded, that the Company did not thereafter discuss the controversy in good faith. Aside from the inherent vice of piling inference on inference, this course of reasoning ignores the fact that in its lengthy discussions with the shop committee the Company was represented by its attorneys, both of whom were directors of the Company and one of whom was also a vice president (2 R. 849; 3 R. 1322). Plainly, the ultimate and exclusive control of the matter was not in Rapport's hands. Therefore in assuming an anti-union attitude on the part of Rapport and in concluding that such attitude must control in evaluating the contention that the Company refused to bargain collectively, the Board and the court gave effect

to mere suspicions which are controverted by the established facts.

The main reason why those ancient acts cited by the Board have no relevance is that they have nothing to do with the question of collective bargaining. They all relate to the issue of coercion and restraint. They are immaterial even on that issue because they never influenced a single employee. Every one of the employees joined the Union. None ever resigned from it. Rapport's remarks critical of unions never had any effect on anyone.

As an excuse for adducing those totally irrelevant statements of Rapport, the Board in its brief (footnote 4 on page 9) says that those ancient incidents form part of the "totality of the Company's activities during the period in question." They did not. The period under investigation was in March, 1939, and thereafter. The incidents referred to took place long before. There is no reason to believe that the Company continued to have in March, 1939, the distrust of unions which it had in March, 1937, at the time of the wave of sitdown strikes throughout the country. In all other relations of life, the law respects the principle of *locus poenitentiae*. From contact and experience the Company had learned in 1939 that there was nothing objectionable about unions. When the four new men were hired a few days before the strike of March 10, 1939, the Company encouraged them to join the Union (4 R. 1581; 2 R. 840; 3 R. 1198-1199, 1142-1143).

But even if it were true that certain officers of petitioner continued to have in March, 1939, a dislike of certain Union men, or of the dictatorial methods of some of the members of the shop committee, such a fact has no bearing on the question whether the Company did actually in good faith discuss the contract interpretation differences which arose in 1939. That it did so is undisputed. The

tenuous inferences of the Board cannot stand in the face of direct and undisputed testimony of facts.

2. **The inferences of bad faith based on statements made at the time of the discussions arise from a disregard of the surrounding circumstances and are rebutted by them.**— The matter as to which it is claimed the employer refused to bargain was not a dispute over wages, hours, or working conditions; it was not over the reinstatement of any employee, because no one had been discharged; it did not involve any conflict between labor organizations. Neither was there any suggestion of a desire by the Union to execute a new contract or to negotiate an amendment to the existing agreement.

The dispute was wholly and solely over the assertion by the Union that *under the existing contract* of employment it had a right to dictate whether new employees should be hired and to what work they should be assigned.

a. The Company has always recognized that under the Act it is required to discuss with the shop committee contract interpretations suggested by the latter.—The term, "bargain collectively", as used in the Act is not, in its primary meaning, suitable to describe the process of a conference directed toward composing or eliminating a difference over the interpretation of a contract. When the courts have applied the requirement of collective bargaining to dealings addressed to forming the terms of a new contract, they have often used the word "*negotiate*" as synonymous with bargaining collectively. In such a situation the parties *are* negotiating. The process of negotiation of contract terms involves barter and give and take. But when an ethical party is contending for a given interpretation of a contract he does not employ the methods of bartering. He depends on facts and arguments. He

does not trade. He *discusses*. The duty to "bargain collectively" which the employer owed the employees with reference to the disputed interpretation of the contract is a duty "to *discuss* with them its true interpretation if there is any doubt as to its meaning" (*National Labor Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 342). The Company did so, as set forth in the Petition, in the text above, and as recognized by Board Member Leiserson in his dissent (1 R. 273).

b. *The shop committee's assertion that "negotiation" with respect to the hiring of new employees was required was based not on the statute but solely upon the contract of employment.*—The disputed rights of the employer and the Union in the selection and assignment of new employees depended entirely upon the terms of the subsisting contract, because even the shop committee recognized that the selecting and assigning of new employees were privileges of the management in the absence of contract provisions to the contrary. However, the shop committeemen contended that the terms of the contract in force gave them a voice and a veto in such selecting and assigning of new employees.

That the contract did not give the Union the rights claimed is not debatable. The Board has never attempted to set forth any reasons in support of the Union's interpretation claims. There are none. But the Union contended it had such contract rights. The employer had never denied that the Union had a right to discuss with the employer its claims as to the meaning of the contract and to have from the employer a statement of the employer's reasons why the Union's interpretations of the contract are untenable. The employer undertook to state to the Union representatives its reasons for rejection of the employees' contract interpretations. But the very statement of the Company's reasons in support of its sound interpretation has been

distorted into a declaration of a refusal to bargain. That distortion has a certain superficial plausibility by reason of a confusion with respect to different meanings of the word "negotiate" and with respect to the character of the dispute about which the law required the parties to "bargain", as set forth in the next paragraph.

c. *Rapport's so-called refusal to "negotiate" was a mere denial of existence of the Union's asserted contract right of voice and veto in hiring.*—Here the Union was not seeking to enforce its statutory right to collectively bargain or negotiate for a contract of employment or an amendment of the existing agreement. The bargain had been made. The committee was merely contending for recognition by the Company of the right asserted by the Union to a voice and veto in the hiring and assignment of men *under the existing contract.* The shop committeemen claimed that the Company's violation of the contract consisted of depriving the Union of those asserted *contract* rights to negotiate with the management before the four new men were hired and assigned. Rapport denied that *the contract* gave the employees any such right to negotiate with the employer as to what new employees should be hired or as to the work to which the new employees should be assigned (See Pet., pp. 25, 34-35).

In this case the employees were uneducated or little-educated men. Rapport was likewise not an educated man. He did not have an understanding of shades of meaning of words of Latin derivation. His concepts of the meaning of "arbitration" and of "personnel" were hazy and inaccurate (2 R. 1049-1050, 1053). The shop committeemen were as loose as Rapport in the use of the words "negotiate" and "arbitrate". Both the committeemen and Rapport used the words "negotiate" and "negotiation" to describe the claimed duty involved in the contract interpretation dispute. The men claimed that *the contract* gave the Union

a right to negotiate with the Company in the determination of what new employees should be engaged and of what work they should be assigned. Thus, when the men claimed that *under the contract* the ordinary function of management had been changed so as to give the men the right to negotiate over the hiring and assignment of new employees, and when Rapport said they had no right to "negotiate" such matters, the language was directed merely to a statement of the difference over the rights granted in the contract provisions.

d. *Rapport's denial of the Union's interpreted contractual right of "negotiation" had no relevance as to his intent to conform to the statutory duty of the Company to discuss the contention.*—It is absurd to say that the language of Rapport referred to at pages 12 and 13 of the Board's brief was a declaration of a refusal to bargain collectively—of a refusal to discuss the true interpretation of the contract provisions. The absurdity of such a contention is manifest from the fact that, at the very time some of those statements were being made in the meeting of March 6th, the employer, by its officers and its lawyers, *was* conferring, *was* discussing, and *was* trying to compose the difference of interpretation. On that occasion the officers and lawyers on behalf of the Company were actually stating and explaining the reasons for their interpretation of the contract and were genuinely endeavoring to persuade the Union representatives that they had no basis for their interpretation (see Pet., pp. 25-27, 30-31, 33-34). The undisputed evidence discloses that the Company was then doing precisely what this Court in the *Sands Manufacturing Company* case said was the measure of the employer's duty under the collective bargaining requirement, namely, to discuss with the employees the contract's true interpretation. As soon as the Union asked

for a meeting to discuss their claim that the hiring of the four new men was in violation of the contract, a meeting (that of March 6th) was held between the Union representatives, including representatives of the national organization (1 R. 248; 3 R. 1347), on the one hand, and three directors of the Company, including the president and the vice president on the other (Pet., pp. 25-27, 31-35).

From statements of Rapport and others that hiring of men was not a matter for negotiation and that there would be "no interpretation of the contract", the Board concludes not that the Company did not negotiate—for the evidence is ample that it did discuss the differences with the shop committee—but that it "did not enter into the discussion with Local No. 120 concerning the interpretation of the 1938 contract with 'an open and fair mind' " (1 R. 256). Since this decisive conclusion of ultimate fact is based on inferences from the language purportedly used it was obviously essential to consider the circumstances in which the alleged statements were made and with regard to the precise contentions to which they were addressed as answers.

With respect to the meetings between the Company and Union representatives, the Board and the court laid heavy emphasis on two types of statements made by Rapport: (1) That the newly hired men were going to remain in the blanket department, that he had had to accept the shop committee's contentions before but this time he was prepared; and (2) that he would not "negotiate" (1 R. 246-250, 255; 4 R. 2042-2044).

The first type of statement was nothing more than a strong statement of the Company's position and a warning that it was in a better economic position to withstand a strike if it should come to that. Nothing in the law commands an employer to desist from vigorous and positive arguments; the law does not require the employer always

to surrender his rights. This Court has repeatedly recognized that the employer may remain firm in his position and, without violating the law, refuse entirely to make a collective contract. *National Labor Board* v. *Jones & Laughlin Corp.*, 301 U. S. 1, 45; *Virginian Ry.* v. *Federation*, 300 U. S. 515, 549, 557 note; *National Labor Board* v. *Mackay Co.*, 304 U. S. 333, 345-346; *National Labor Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 343, 344. *A fortiori*, the employer, in bargaining, may be equally firm in stating his reasons and grounds and in asserting his position.

As to the second type, the statements that there would be no "negotiation," that the committee "had no right" to negotiate concerning the hiring of the four men (1 R. 255) and that there would be "no negotiations on interpretation of the contract" (Br. in Opp., p. 12), it is plain that regard must be had to the precise nature of the demand that the shop committee was making. The committee claimed that *under their interpretation of the employment contract*, before hiring of new men by the Company, a reference was required to be made to the committee and thereupon the committee under this same interpretation had the right to finally determine whether the men should be hired, regardless of their willingness to join the Union, and the further right, if they were hired, to determine the department to which they should be assigned. The shop committee apparently regarded these privileges as constituting a right to "negotiate" with the Company with respect to the hiring of men. There is no evidence whatever, substantial or otherwise, that Rapport or any other representative of the Company said on March 2nd, or at any other time prior to the conference of March 6th, that the Company would not negotiate on the interpretation of the contract. The only evidence with respect to such language is in the testimony of Nielson, who was testifying about the compromise proposal of Moore that the Union

name two men and the Company name two men for work in the blanket department (1 R. 328). That proposal was made near the close of the long conference of March 6th and after the contract interpretation matter had been extensively discussed and after the committee's interpretation had been conclusively refuted in argument (2 R. 655, 896; 3 R. 1360-1361; 1 R. 475-476; and see record references, Pet., 26-27). After Nielson had testified about the Moore proposal he was asked what the Company's answer to it was. He testified: "They said the hiring of those men is a question of management, that we have told you that before, [and] that there will be no negotiations on interpretation of the contract" (1 R. 328). In view of the facts that the interpretation question had been fully discussed and that the employer had by argument established that the committee's interpretation was untenable, the statement, if then or thereafter made, meant merely that it was useless to discuss that interpretation question further. If made, the statement indicated simply that the company officials did not and would not, after the discussion which had been had, recognize any such claimed right under the existing contract (see Pet., pp. 24, 34-35). It is highly important to note that the only testimony with respect to that statement is that it was made after the Company had discussed at length the interpretation of the contract.

Properly understood and taken in context, these expressions amounted to no more than affirmations that (1) under the contract there was no right in the Union to veto applicants hired by the Company and (2) that the Company intended not to yield and agree to any purported "interpretation" of the existing contract which would so seriously invade the sphere of management.

The Board (1 R. 247) first refers to statements of Schwartz that "management has seen fit to place these men, management has seen fit to keep them there." This

was obviously a mere statement of the ordinary management right to hire men (1 R. 467). The Board next refers (1 R. 247) to Rapport's entrance at the time the shop committee first voiced its complaint to Schwartz, and to the shop committee's statement (2 R. 972):

> we got seniority right situation here we want to discuss

and to Rapport's answer:

> I don't think there is anything to discuss, everybody is working, we hired some additional men, that is all there is.

Certainly no fault can be found with this answer to a contention so ill-founded.

The Board also refers to alleged further statements of Rapport at the same short meeting on March 2 (1 R. 247) which when read in context disclose nothing more than adherence to his position that nothing *in the contract* required the employer to treat or "negotiate" with the committee for permission to hire men. He merely asserted the independent right to hire men and a purpose not to accede to any so-called "interpretation" of the contract terms which plainly granted no such veto power to the Union (1 R. 321). The Board insists on treating this statement as an expression of intent not to discuss the matter of the alleged interpretation with the employees as required by the Act and as showing lack of good faith. This is in entire disregard of the facts of record.

At the meeting on March 6, which lasted about five hours, every argument of the Union was listened to and answered. Every question in dispute was discussed at length. In the discussion the Union claims of contract interpretation were shown to be erroneous on every point (Pet., pp. 25-27). The discussion established that the supposed grievance of the employees was on a matter of very little consequence

and it was so characterized by the chief representative of the national union organization present at the negotiation (1 R. 474; 2 R. 1044; 3 R. 1348). On every point of difference discussed at the meeting, the Union was wholly without valid reason. The sole complaint of the Union reduced itself to a claim of violation of the contract. There was not the slightest basis for a charge that the terms of the contract had been violated. The Board has adduced no argument in support of the Union's preposterous interpretation. When the shop committee began to doubt, as its ablest member described it, "whether it had any legal legs to stand on" (4 R. 1774), the Union interjected into the situation demands for the discharge of Schrambeck. The Union threatened drastic action, meaning a strike, unless Schrambeck was discharged (4 R. 1915, 1917); it is now apparently conceded the employer was under no duty to comply with that demand to discharge Schrambeck. A fair reading of the testimony of the witnesses to which the Board in its brief, p. 13, cites, can leave no reasonable doubt that Rapport was merely constantly reaffirming his position that under the contract the Committee had no right to "negotiate" as to the hiring of men (See 1 R. 324, 328; 2 R. 655, 973).

It is apparent that the error of the court below is not confined to a mere statement of an erroneous rule of law. Pursuant thereto it has in fact erroneously ignored all evidence favorable to petitioner. The error, of course, has been extremely prejudicial to petitioner because, as shown above, most of the factual evidence so disregarded directly and conclusively rebuts the inference upon which the Board's ultimate finding of failure to bargain is based.

The rule established as applicable by this Court (*Gunning* v. *Cooley*, 281 U. S. 90, 94; *National Labor Board* v. *Columbian Co.*, 306 U. S. 292, 299-300) is:

> this court assumes that the evidence for the opposing party [the Board] proves all that it reasonably may be found sufficient to establish and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them.

This has been perverted by the court below into the rule announced by it (4 R. 2036):

> In discharging our duty in these circumstances, we look only to the evidence that is favorable to the Board.

The Board professes to see no distinction between the two rules and persists in treating them as identical (Br. in Opp., p. 17). The question of the scope of review of decisions of the National Labor Relations Board is of manifest general importance. Because the court below has decided this important question of Federal law in a way clearly in conflict with the decisions of other circuit courts of appeals and of this Court, it is submitted that review by this Court is imperative.

III.

THE STRIKERS MADE NO OFFER TO CEASE STRIKING AND RETURN TO WORK

In the Petition, pp. 38-40, it is pointed out that the alleged offer of the striker to return to work, upon which the requirement of back pay contained in the Board's order (1 R. 265-266, 271-272) and the Court's decree (4 R. 2072) was based, was not a simple offer to return to work at all. The offer of the Union was modified and hedged about with conditions which required that the Company yield on all the points of dispute which were the occasion for the strike.[3]

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[3] The Board's brief (pp. 14-15) cites copiously in purported support of the proposition that "On May 9, 1939, Local No. 120 unconditionally offered the return to work of all the strikers." Reference to the cited record pages indicates the lack of foundation for the Board's finding

The Board's brief (p. 20) misstates and fails to meet petitioner's contention, asserting that the Company's objection to the efficacy of the offer is grounded merely on the Union's condition that "petitioner reemploy all the strikers". As pointed out in the Petition (p. 39), the objection to the form of the offer to return to work is not that it was a group offer but that—

> the strikers offered to returned to work if all their demands, which are alleged to have occasioned the strike, were first met. It was not an offer to cease striking and return to work, but a demand that the Company surrender and capitulate on every point.

The fundamental absurdity of the Board's order and the Court's approval is apparent. For under the rule thus established, strikers can place the employer in default if, after calling a strike to enforce their demands, they make an offer to return to work conditioned upon the granting of all the demands whose denial was the occasion for the strike. That is exactly the situation in this case and the Board has failed in any way to meet the point.

(1 R. 252). The first citation, "R. 1017-1022," fails to show what was meant by the Union's requirement that all striking employees come back in a group. While the second citation, "R. 717-726," might possibly be regarded as an implied unconditional offer, other testimony not in conflict therewith, and hereinafter referred to, shows that that was not unconditional. Other citations are to meetings on other dates, either before or after May 9, the date fixed upon by the Board: "R. 746" relates to June 26, 1939; "R. 763-764" refers to June 28; "R. 756-757" refers to April 21 (See R. 754), and on that date the Union was apparently insisting on return only under the terms of the Union's new draft of contract of employment for the year commencing in April, 1939, including clause 8 (R. 1921) which required discharge of non-union employees on Union request (R. 755-758). The next reference ("R. 780-782") relates to March 16. At "R. 984" there is nothing to show an unconditional offer. The last two citations by the Board ("R. 1399-1401, 1410") sustain petitioner's assertion that the Union's offer to return was conditioned on discharge of all non-union employees, including those whose hiring had first occasioned the dispute. The condition of the offer thus required recognition of the Union's asserted right to veto hirings which was the very matter in dispute ("R. 1399-1401, 1410").

IV.

THE TERMS OF THE REMAND OF THE CASE WITH INSTRUCTIONS TO DETERMINE DEDUCTIONS FROM BACK PAY IMPOSE AN UNLAWFUL BURDEN UPON PETITIONER AND ARE PROPERLY QUESTIONED BY PETITIONER

To petitioner's contention that "it is for the Board to determine the theory upon which it will proceed * * * and then to present its evidence and formulate its modification of the order" on the issue of deductions from back pay (Pet., p. 37), the Board answers that "this was in no sense a part of the Board's case" (Br. 21). In short, the Board takes the position that this is an ordinary suit at law or in equity in which the respondent must proceed, with reference to deductions, as though it were a counterclaim or set-off in private judicial proceedings. But this Court has recently and repeatedly denied that Board proceedings are of that nature:

> The proceeding authorized to be taken by the Board under the National Labor Relations Act is not for the adjudication of private rights. * * * It has few of the indicia of a private litigation * * * The Board acts in a public capacity to give effect to the declared public policy of the Act. (*National Licorice Co.* v. *Labor Board*, 309 U. S. 350, 362.)

> Attainment of a great national policy through expert administration in collaboration with limited judicial review must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies. (*Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 188.)

> A statute expressive of such large public policy * * * must be broadly phrased and necessarily carries with it the task of administrative application. *Id.*, at 194.

> The power with which Congress invested the Board implied responsibility—the responsibility of exercising its judgment in employing the statutory powers. *Id.*, at 194.

And, with particular reference to the determination of deductions for back pay, this Court has said that "the remedy of back pay * * * is entrusted to the Board's discretion; it is not mechanically compelled by the Act" (*id.*, at 198); "in applying its authority over back pay matters, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations" (*id.*, at 198); and the period to be covered by such deductions as well as procedural variations lie within the Board's discretion (*id.*, at 198-199, note 7). When this Court said that "the employer should be allowed to go to proof on this issue" (*id.*, at 200) it meant no more than that, upon and in any proceeding framed and conducted by the Board for the making of the record, the employer should be entitled to participate, cross examine, offer rebuttal, and present evidence. Such a proceeding is a far cry from the Board's present demand that the employer assume the initiative, frame proceedings as for a counterclaim, and present proof thereon.

Upon the same authorities, and by the same token, the Board's contention that "it is not open to petitioner to complain" (Br. 21) is ill founded. These are proceedings of a peculiarly public and administrative character, as set forth above. Petitioner, like any other party to Board proceedings, is entitled to insist that the Board perform its statutory function in applying a remedy directly affecting the petitioner. It is an executive, as distinguished from adjudicating, function of the Board to frame and initiate the proceeding and then to make a record on the subject of

deductions for back pay. Petitioner does not complain of the infringement of other parties' rights, to which the Board confines its citations (Br. 21), but of the failure of the Board as an administrative agency to perform its public function and of the attempt to shift the whole burden of initiative and proof to petitioner.

CONCLUSION

Because of the errors of law in the decision of the court below, which are not only highly prejudicial to the petitioner but plainly create a conflict with the decisions of this Court, it is submitted that writ of certiorari should be granted.

Respectfully,

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August 1942.